INDEX

	Page
Opinion below	1
Jurisdiction	1
The question	2
The statutes	2
The regulations	3
Statement	4
Argument	5

CITATIONS

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1116:	
Sec. 628	2
Sec. 629	3
Treasury Regulations No. 52, art. 8	3

103822—28

In the Supreme Court of the United States

OCTOBER TERM 1927

No. 858

LASH'S PRODUCTS COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 15–16) is not yet reported.

JURISDICTION

The judgment sought to be reviewed was entered November 7, 1927. (R. 16.) A motion for a new trial was overruled on January 23, 1928. (R. 17.) Petition for writ of certiorari was filed March 24, 1928. (R. 17.) Jurisdiction of this Court to issue the writ is found in Section 3 (b) of the Act of February 13, 1925.

THE QUESTION

Does the payment of an excise tax imposed upon the manufacture and sale of soft drinks decrease the selling price of the beverages by the amount of the tax and make such decreased amount the measure of the tax?

THE STATUTES

Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1116):

> SEC. 628. That there shall be levied, assessed, collected, and paid in lieu of the taxes imposed by sections 313 and 315 of the Revenue Act of 1917—
>
> (a) Upon all beverages derived wholly or in part from cereals or substitutes therefor, and containing less than one-half of one per centum of alcohol, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 15 per centum of the price for which so sold; and upon all unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold; and
>
> (b) Upon all natural mineral waters or table waters, sold by the producer, bottler, or importer thereof, in bottles or other closed

containers, at over 10 cents per gallon, a tax of 2 cents per gallon.

SEC. 629. That each manufacturer, producer, bottler, or importer of any of the articles enumerated in section 628 shall make monthly returns under oath in duplicate and pay the taxes imposed in respect to such articles by such section to the collector for the district in which is located the principal place of business, containing such information necessary for the assessment of the tax, and at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

THE REGULATIONS

Regulations 52:

ART. 8. *Basis for tax: sale price.*—The tax is on the sale by the manufacturer of the beverage. It is measured by the price for which the beverage is sold. It is on the actual sales price of the beverage sold and not on the list price where that differs from the

> sales price. If the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sales price, but where the tax is billed as a separate item it is not to be considered as an increase in the sales price. The tax is payable in respect to a sale made whether or not the purchase price is actually collected.

STATEMENT

The petitioner, a California corporation (R. 12), during the period June, 1919, to December, 1921, manufactured and sold certain soft drinks, or beverages (R. 13, 14). Orders for the sale of the said beverages were obtained by petitioner's salesmen who called upon the customers for that purpose. In quoting prices on the beverages, petitioner's salesmen advised the customers that the said prices included the tax which would be paid by the petitioner. (R. 12.) Petitioner also advised the trade by letters dated June 28, 1919, of the prices of its various beverages, and in said letters notified the trade as follows (R. 13):

> You will please note that *we pay the tax* on our non-intoxicating goods—which amounts to 10%— and as they sell at 10¢ or more per drink, it leaves a nice margin of profit for you. (Italics ours.)

During the period June, 1919, to December, 1921, petitioner sold to its customers soft drinks having an aggregate selling price of $2,475,031.44. The

invoices rendered to the customers were not itemized so as to show any tax, but indicated the amount billed as the price of the beverages. Said amounts were paid by the customers to the petitioner. (R. 13.)

Petitioner reported monthly to the Bureau of Internal Revenue, on proper returns, the amounts received by it on account of said sales, and paid, during the period aforesaid, taxes aggregating $247,503.16, which represented 10% of the amount so received. (R. 13.)

Claims for the refund of $22,500.33 of the said tax were filed by the petitioner on the ground that the "price" of its products included the 10% tax, and therefore the actual selling price was not the amounts billed to and received from the customers but was those amounts less the tax. Said claims were rejected by the Commissioner of Internal Revenue and this suit presents the question to this Court. (R. 14.)

ARGUMENT

The question in this case is like that in No. 949, *Fauntelroy, Collector,* v. *Elmer Candy Co.*, pending on petition for certiorari filed by a Collector of Internal Revenue to review a judgment of the Circuit Court of Appeals for the Fifth Circuit. The principal ground for our petition in that case was the conflict between the decision there and that

of the Court of Claims in this case. We can not consistently oppose this petition.

Respectfully submitted.

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MAY, 1928.

INDEX

	Page
Opinion below	1
Jurisdiction	1
The question presented	2
The statute	2
The regulations	4
Statement	6
Summary of argument	7
Argument:	
I. The tax imposed by sections 628 and 629 of the revenue act of 1918 is a tax upon the manufacturer, producer, or importer	9
II. The authority of the Commissioner of Internal Revenue to adopt article 8 of Regulations 52 is doubtful. The regulation may be considered to have been confirmed by Congress, but if so it was confirmed as a whole, including the requirement for separate billing of the tax	13
III. Whether or not article 8 of Regulations 52 is valid the petitioner can not succeed	21
IV. The cases in the lower courts	22
Conclusion	23
Appendix A: Provisions of the revenue act of 1918, other than section 628, imposing a sales tax on the vendor measured by selling price	24–26
Appendix B: Provisions of the revenue act of 1918, imposing a tax upon purchaser measured by the "amount paid"	27–33
Appendix C: Section 1312 of the revenue act of 1918	34–35
Appendix D: Treasury regulations dealing with the excise tax imposed by section 900 of the revenue act of 1918 upon the selling price of various commodities	36–38
Appendix E: Treasury regulations dealing with the tax on works of art, sold by any person other than the artist, imposed by section 902 of the revenue act of 1918, and the tax upon certain sales of jewelry by dealers, imposed by section 905	39–40

CITATIONS

Cases:

Cheynot Club Co. v. *United States*, 13 F. (2d) 655	22
Cohan, George M. v. *Commissioner of Internal Revenue*, 11 B. T. A. 743	17
Elmer Candy Co., Inc., v. *Fauntleroy, Collector*, 19 F. (2d) 664; reversed, 24 F. (2d) 95; now pending on writ of certiorari, No. 119, October term, 1928	23

Cases—Continued. Page

Elmira Arms Co. v. *Commissioner of Internal Revenue*, 7 B. T. A. 703 16–17

Heckman & Co., Inc., v. *I. S. Dawes & Son Co., Inc.*, 12 F. (2d) 154 14

National Lead Co. v. *United States*, 252 U. S. 140 19

United States v. *G. Falk & Brother*, 294 U. S. 143 19

Wayne County Produce Co. v. *Duffy-Mott Co.*, 244 N. Y. 351 .. 15–16

White Rock Mineral Springs Co. v. *Edwards*, 23 F. (2d) 539 23

Statutes:

Revenue act of 1918, c. 18, 40 Stat. 1057—

Section 500(a) 27

Section 501(a) 27

Section 502 28

Section 628 ..... 2, 10

Section 629 ..... 3, 10

Section 800(a) 29–30

Section 801 30–31

Section 802 31

Section 900 ..... 19, 20, 24

Section 902 ..... 20, 24

Section 903 24

Section 904(a) 31

Section 904(c) 32

Section 905 25

Section 907(a) 32

Section 907(b) 32

Section 1312 ..... 12, 34–35

Revenue act of 1921, c. 136, 42 Stat. 227—

Section 900 20

Section 902 20

Section 905 20

Revenue act of 1924, c. 234, 43 Stat. 253—

Section 600 20

Section 602 20

Section 604 20

Revenue act of 1926, c. 27, section 600, 44 Stat. 9, 93 20

Treasury regulations, etc.:

No. 47, article 3, issued May 1, 1919 ..... 20, 36

No. 47, article 3, revised December, 1920 ..... 20, 36–38

No. 47, article 3, revised January 6, 1922 (T. D. 3278; August 29, 1924 (T. D. 3630); May 1, 1926 (T. D. 3862) ... 20

No. 48, article 1, issued May 2, 1919 39–40

No. 48, article 1, revised January 12, 1922 (T. D. 3279); September 16, 1924 (T. D. 3632) 20

No. 52, article 8, issued May 3, 1919 4

Internal Revenue Bureau Cumulative Bulletin, January–June, 1921, sales tax rulings, p. 27 4–5

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 98

LASH'S PRODUCTS COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 15–16) is reported in 64 Ct. Cls. 252.

JURISDICTION

The judgment sought to be reviewed was entered November 7, 1927. (R. 16.) A motion for a new trial was overruled on January 23, 1928. (R. 17.) Petition for writ of certiorari was filed March 24, 1928. (R. 17.) Certiorari was granted May 28, 1928. (R. 18.) Jurisdiction is conferred upon this Court by Section 3 (b) of the Act of February 13, 1925.

THE QUESTION PRESENTED

Sections 628 and 629 of the Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1116), impose upon soft drinks sold by the manufacturer, producer, or importer a tax, to be paid by the manufacturer, producer, or importer measured by "the price for which so sold." The question presented is whether, in a case where the manufacturer advised its customers that its prices included the tax, which would be paid by the manufacturer, but the invoices rendered to the customers were not itemized so as to show any tax, "the price for which so sold," within the meaning of the statute, is the total amount received by the manufacturer or such amount decreased by the amount of the tax.

THE STATUTE

The applicable portion of the Revenue Act of 1918 is as follows:

> SEC. 628. That there shall be levied, assessed, collected, and paid in lieu of the taxes imposed by sections 313 and 315 of the Revenue Act of 1917—
>
> (a) Upon all beverages derived wholly or in part from cereals or substitutes therefor, and containing less than one-half of one per centum of alcohol, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 15 per centum of the price for which so sold; and upon all unfermented grape juice, ginger ale,

root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold; and

(b) Upon all natural mineral waters or table waters, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 10 cents per gallon, a tax of 2 cents per gallon.

SEC. 629. That each manufacturer, producer, bottler, or importer of any of the articles enumerated in section 628 shall make monthly returns under oath in duplicate and pay the taxes imposed in respect to such articles by such section to the collector for the district in which is located the principal place of business, containing such information necessary for the assessment of the tax, and at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

Other sections of the Revenue Act of 1918, which tend to throw light on the proper interpretation of Sections 628 and 629, are set forth in appendices.

THE REGULATIONS

Regulations 52, issued May 3, 1919, contains the following:

> ART. 8. *Basis for tax: sale price.*—The tax is on the sale by the manufacturer of the beverage. It is measured by the price for which the beverage is sold. It is on the actual sales price of the beverage sold and not on the list price where that differs from the sales price. If the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sales price, but where the tax is billed as a separate item it is not to be considered as an increase in the sales price. The tax is payable in respect to a sale made whether or not the purchase price is actually collected.

The interpretation placed by the Bureau of Internal Revenue upon this regulation is shown by a ruling contained in Sales Tax Rulings, Internal Revenue Bureau Cumulative Bulletin January-June, 1921, page 27, as follows:

> The interpretation which the Bureau places upon the regulations with respect to the basis of the tax under section 628 of the Revenue Act of 1918 is as follows:
>
> * * * * *
>
> Article 8 of Regulations 52 provides that the tax is measured by the price for which

the beverage is sold by the manufacturer and that if the price of the beverage is increased to cover the tax the tax is on such increased price which includes the amount added by the manufacturer to cover the tax.

On the other hand, if the price is not increased to cover the tax, but the manufacturer quotes the price of the beverage and the amount of the tax as separate items and in the exact amounts represented by such items, and, in the event bills or invoices are rendered, shows the items separately therein, the tax does not attach to the amount representing tax on the selling price of the product.

In other words, the theory of the regulations is that the tax is on the price for which the manufacturer sells his product at the time and place where he sells it; that this price must be clearly indicated in quotations and invoices, but that if other items, such as transportation expenses or tax are included in the selling price without segregation, the tax must be based on the total selling price including such other items. It is not sufficient for the purpose of current returns that the books or records of the manufacturer show the different items entering into the selling price, if the purchaser is not fully informed by quotation in advance of the sale, and by the invoice for the goods, when such invoice is made, of the different items entering into the quoted or invoiced price.

STATEMENT

The petitioner, a California corporation (R. 12), during the period from June, 1919, to December, 1921, manufactured and sold certain soft drinks or beverages (R. 13, 14). Orders for the sale of the said beverages were obtained by petitioner's salesmen who called upon the customers for that purpose. In quoting prices on the beverages petitioner's salesmen advised the customers that the said prices included the sales tax, which would be paid by the petitioner. (R. 12.) Petitioner also advised the trade by letters dated June 28, 1919, of the prices of its various beverages, and in said letters notified the trade as follows (R. 13):

> You will please note that we pay the tax on our nonintoxicating goods—which amounts to 10%—and as they sell at 10¢ or more per drink, it leaves a nice margin of profit for you.

During the period June, 1919, to December, 1921, petitioner sold to its customers soft drinks having an aggregate selling price of $2,475,031.44. The invoices rendered to the customers were not itemized so as to show any tax, but indicated the amount billed as the price of the beverages. Said amounts were paid by the customers to the petitioner. (R. 13.)

Petitioner reported monthly to the Bureau of Internal Revenue, on proper returns, the amounts received by it on account of said sales, and paid,

during the period aforesaid, taxes aggregating $247,503.16, which represented 10% of the amount so received. (R. 13.)

Claims for the refund of $22,500.33 of the said tax were filed by the petitioner on the ground that the "price" of its products included the 10% tax, and therefore the actual selling price was not the amount billed to and received from the customer but was that amount less the tax. The claims were rejected by the Commissioner of Internal Revenue on the ground that the petitioner "did not indicate the tax in such a way as not to be a part of and included in the price" for which the product was sold. (R. 14.) This suit resulted. The Court of Claims held that the petitioner was not entitled to recover. (R. 14–17.)

SUMMARY OF ARGUMENT

The tax imposed by Sections 628 and 629 of the Revenue Act of 1918 is a tax upon the manufacturer, producer, or importer and no liability or obligation with respect to the tax is imposed upon the purchaser. This is clear both from the provisions of the sections themselves and from a comparison of the sections with other provisions of the Act. Two kinds of taxes based on sales were provided for by the Act. The first kind, in which the tax imposed by Sections 628 and 629 is included, is a tax upon the seller measured by the *selling price*. The second kind is a tax upon the purchaser measured by the *amount paid*, and the seller is merely constituted a

collecting agency, charged with the duty of receiving the tax from the purchaser and paying it over to the Government. Throughout the Act Congress used language which clearly distinguished between these two kinds of taxes.

Giving the words their ordinary meaning, the price for which an article is sold is the total amount which the vendor receives for it. The theory of Article 8 of Regulations 52, however, is that by billing the tax separately a vendor may divide the amount received by him into two items, one representing selling price and the other representing tax. This presupposes that the tax as a tax may be passed on to the purchaser, a theory which seems to us very doubtful in view of the fact that no matter what the agreement between the vendor and purchaser may be, the liability for the tax under the Revenue Act of 1918 still rests upon the vendor and the purchaser is under no duty or liability to the Government with respect thereto.

The effect of the regulation was to adopt a different base for the computation of the tax than that specified in the statute.

The Commissioner has always construed the words "the price for which so sold" in Section 628 of the Revenue Act of 1918 and other similar sections of that and subsequent Acts as being the total amount received if the tax is not quoted and billed separately and as being that amount less the tax if the tax is quoted and billed separately. The tax imposed by Section 628 was not continued in subse-

quent Revenue Acts, but other similar taxes were continued without substantial change of language in such Acts. It is arguable, therefore, that Congress has approved and ratified the Commissioner's construction of the words "the price for which so sold."

Whether or not Article 8 of Regulations 52 is valid the petitioner can not succeed. If the regulation is invalid, there is no provision for passing on the tax, as such, to the purchaser, and the total amount received by the seller must represent the selling price on which the tax is computed. On the other hand, if the regulation is valid because of Congressional ratification, this applies equally to all portions of the regulation; and if the provision permitting the tax to be passed on is valid, so must be the requirement of separate billing in order to accomplish this. The petitioner did not comply with the requirement and has no right to complain.

Cases in the lower Federal courts involving claims similar to that of the petitioner in this case are about evenly divided upon the question whether or not the taxpayer should recover.

ARGUMENT

I

THE TAX IMPOSED BY SECTIONS 628 AND 629 OF THE REVENUE ACT OF 1918 IS A TAX UPON THE MANUFACTURER, PRODUCER, OR IMPORTER

Section 628 of the Revenue Act of 1918 provides that there shall be levied, assessed, collected, and paid:

> upon all * * * soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold; * * *

And Section 629 provides:

> That each manufacturer, producer, bottler, or importer of any of the articles enumerated in section 628 shall make monthly returns under oath in duplicate and pay the taxes imposed in respect to such articles by such section * * *.

Clearly this is a tax upon the manufacturer-producer, or importer. There is nothing in the statute which imposes upon the purchaser any liability or obligation with respect to the tax.

Sections 628 and 629 seem clear and unambiguous and further argument in support of the view that the tax is imposed upon the manufacturer, producer, or importer is perhaps unnecessary. However, other provisions of the Revenue Act of 1918 demonstrate beyond doubt that this view is correct. Two kinds of taxes based on sales were provided for by the Act. The first kind, in which the tax imposed by Section 628 is included, is a tax upon the seller measured by the *selling price*. The second kind is a tax upon the purchaser measured by the *amount paid*, and the seller is merely constituted a collecting agency, charged with the duty of receiving the tax from the purchaser and paying it over to the Government. In the former

class are the excise taxes imposed by Section 900 upon a long list of articles of miscellaneous character "sold or leased by the manufacturer, producer, or importer," the tax imposed by Section 902 upon works of art "sold by any person other than the artist," and the tax imposed by Section 905 upon jewelry "when sold by or for a dealer or his estate for consumption or use." The provisions of the statute showing the nature of these taxes are set forth in Appendix A.

In the class of taxes imposed upon the purchaser and measured by the amount paid are the tax imposed by Section 500 on "the amount paid for" transportation and other facilities, the normal taxes imposed by Sections 800 and 801 upon amounts paid for admissions or dues (although additional taxes imposed on sales at places other than the box office, on sales at amounts in excess of regular rates, etc., are imposed upon the seller), the tax imposed by Section 904 measured by "so much of the amount paid for any of the following articles as is in excess of the price hereinafter specified as to each such article," the articles in question being various articles of clothing, furnishings, etc., and the tax imposed by Section 907 measured by the amount paid for toilet articles, proprietary medicines, etc. The provisions of the statute showing the nature of these taxes are set forth in Appendix B.

It appears from the provisions referred to above that in every case in which the seller was made

liable for the tax the phrase employed by Congress to fix the measure of the tax was "the price for which so sold," and in providing for the payment of the tax language appropriate to making it payable by the seller was used. On the other hand, when the tax was laid on the purchaser, Congress not only so stated in plain, unmistakable terms, but in addition each time used the phrase "the amount paid" to indicate the measure of the tax, and each time set forth the method by which the tax should be collected by the vendor.

Section 1312 of the Revenue Act of 1918 was designed to protect vendors who had previously entered into bona fide contracts which did not permit adding to the amount to be paid thereunder the tax, or the increase in tax, provided for by certain sections of the Act, including Section 628. It provides that in such cases under certain circumstances the tax, or the increase in tax, shall be paid by the vendee in lieu of the vendor, and that:

> (4) The taxes payable by the vendee or lessee under this section shall be paid to the vendor or lessor at the time the sale or lease is consummated, and collected, returned, and paid to the United States by such vendor or lessor in the same manner as provided in section 502.

Section 502 is the section dealing with the collection of the transportation tax by the vendor and is set forth in Appendix B of this brief. Section 1312 is set forth in full in Appendix C.

The fact that Congress thought it necessary in order to protect vendors who could not protect themselves from the taxes by raising their prices, to adopt Section 1312 and impose the taxes upon vendees in such cases, necessarily shows that the taxes in question were imposed upon vendors and not upon vendees in cases not within the scope of the section.

II

THE AUTHORITY OF THE COMMISSIONER OF INTERNAL REVENUE TO ADOPT ARTICLE 8 OF REGULATIONS 52 IS DOUBTFUL. THE REGULATION MAY BE CONSIDERED TO HAVE BEEN CONFIRMED BY CONGRESS, BUT IF SO IT WAS CONFIRMED AS A WHOLE, INCLUDING THE REQUIREMENT FOR SEPARATE BILLING OF THE TAX

Giving the words their ordinary meaning, the price for which an article is sold is the total amount which the vendor receives for it. The theory of Article 8 of Regulations 52, however, is that by billing the tax separately a vendor may divide the amount received by him into two items, one representing selling price and the other representing tax. This presupposes that the tax as a tax may be passed on to the purchaser, a theory which seems to us very doubtful in view of the fact that no matter what the agreement between the vendor and purchaser may be the liability for the tax under the Revenue Act of 1918 still rests upon the vendor, and the purchaser is under no duty or liability to the Government with respect thereto.

The statute treated all that was received by the manufacturer for his goods as the price and the basis for computing his tax. The regulation provided that something less than the price received should be the amount on which the tax should be computed.

Heckman & Co., Inc. v. *I. S. Dawes & Son Co., Inc.*, 12 F. (2d) 154, is in point. In that case it appeared that the Commissioner of Internal Revenue had promulgated a regulation construing Section 628 of the Revenue Act of 1918 as imposing upon manufacturers of cider a tax equal to 10% of the price for which sold. As such a manufacturer the defendant paid to the United States 10% of the price for which its cider was sold. The defendant sold a quantity of cider to the plaintiff and added to the selling price the 10% thus paid to the United States. It was later decided that the Revenue Act of 1918 did not authorize the imposition of a tax on cider, and thereupon the defendant sought and obtained a refund of the cider tax paid by it. The plaintiff sought to recover from the defendant the 10% involved, on the theory that the money refunded to the defendant "constitutes a trust fund for the benefit of the plaintiff to the extent that it represents taxes paid by" the plaintiff to the defendant. The Court of Appeals of the District of Columbia held that the plaintiff was not entitled to recover, saying (p. 155):

> The Revenue Act of 1918, as construed by the Treasury Department, imposed a tax on

> the manufacturer, not the dealer. The defendant, as such manufacturer, paid this tax. In selling to the plaintiff, it added to the selling price the amount of the tax, which plaintiff voluntarily paid in order to continue "dealing in cider," which was a large and profitable portion of its business. Defendant paid no tax for the plaintiff but for itself. The sale to the plaintiff was not induced by misrepresentation as to law or fact, nor was it the result of undue influence on the one side and undue confidence on the other. The payment of this 10 per cent by the plaintiff, therefore, was the result of nothing more than a mistake of law, and such a situation presents no ground for equitable relief.

Wayne County Produce Co. v. *Duffy-Mott Co.*, 244 N. Y. 351, took an opposite view upon facts similar to those in the *Heckman & Co. case*. But it is apparent that the decision is based upon the court's interpretation of the contract between the seller and the buyer, and that the court recognized that the tax was on the [redacted] and that the purchaser had no obligation to the Government with respect thereto, since on page 354 it was said:

> We are asked whether a like remedy would be thought to be available, if the tax were still enforcible and the seller had omitted to make payment to the government. But the situation thus supposed has only a remote analogy to the situation now at hand.

> The buyer has no interest, while the tax is an outstanding liability, in the application of the money. The controversy in such circumstances is solely between taxpayer and government. The buyer's duty would remain to supply the promised funds whereby the seller could discharge a continuing obligation.

In *Elmira Arms Co.* v. *Commissioner of Internal Revenue*, 7 B. T. A. 703, the question was whether the petitioner in determining its taxable income was entitled to deduct excise taxes paid on purchases under Section 900 of the Revenue Act of 1918, the language of which is similar to that of Section 628, in the year in which such purchases were made, whether or not the goods were sold in that year, or was compelled to treat such excise taxes as a part of the cost of the goods allowable as a deduction only when the goods were sold. The Board of Tax Appeals said (pp. 705–706):

> The statute levies an excise tax to be paid as an incident to the sale of the article by the manufacturer. Either directly or indirectly the tax is no doubt included in the price which the purchaser pays but it seems clear that the tax is not one imposed upon the purchaser. There is nothing in the law which requires that it be paid by the purchaser or collected by the manufacturer who sells, and if, through ignorance or misunderstanding of the law or for any other reason, the manufacturer fails to add the tax in computing the selling price, it is he and not the

> purchaser who has incurred liability for its payment. It is our opinion that whether the tax is added directly or indirectly to the price which would otherwise be paid, it constitutes a part of the cost to the purchaser of the articles purchased and is not a tax paid by the purchaser.

In *George M. Cohan* v. *Commissioner of Internal Revenue*, 11 B. T. A. 743, the petitioner claimed deductions from income for so-called luxury taxes on jewelry purchased by him, the taxes in question being imposed by Section 905 of the Revenue Acts of 1918 and 1921, which also is similar to Section 628. After quoting from the section the Board of Tax Appeals said (p. 761):

> It is apparent from this quotation that the taxes are imposed on sales by the dealer and are payable by him, and are not imposed on the purchaser. See *Colgate & Co.* v. *United States*, — Ct. Cls. —, decided February 20, 1928. Such being the case, the petitioner is not entitled to any deduction for any amount which he may have paid the jeweler as a reimbursement for excise taxes. If he paid the jeweler any amount on account of excise taxes (and it is not shown that he did) such payment was a reimbursement to the dealer and not a payment of taxes; it was a demand of the jeweler, not of the sovereign.

It is, of course, not enough to justify the regulation here in question that the burden of the tax will fall on the purchaser in the sense that the price

charged him will undoubtedly reflect the amount of the tax imposed upon the vendor.

Every vendor, if he hopes to remain in business, must fix his prices with a view to his expenses in producing and marketing the article sold, including his real-estate taxes, personal-property taxes, and all other items of expense. But it would hardly be argued that these expenses are therefore expenses of the purchaser, or that the selling price is not the full amount received by the vendor but only that amount less such portion thereof as was included to cover such expenses. And the situation could hardly be changed by the vendor's showing on his invoice what portion of the price is his profit and what portions are calculated to reimburse him for his various items of expense.

We have been unable to learn just what provision of the Revenue Act of 1918 the Commissioner of Internal Revenue relied upon as his authority for the ruling contained in Article 8 of Regulations 52. It has been suggested that Section 1312 led to the ruling in question, it being thought that that section indicated that the tax should be passed on to the purchaser. But while Section 1312 undoubtedly contemplates that the vendor will protect himself from the tax by fixing his prices with the tax in view, and in certain cases in which this is impossible because of a preexisting contract imposes the tax directly upon the purchaser, nevertheless there is absolutely nothing in the section to justify passing on the tax by the vendor to the purchaser.

But while we think the validity of Article 8 of Regulations 52 was extremely doubtful when first adopted, similar rulings in connection with other provisions of the Revenue Act of 1918 have received implied recognition by Congress through reenactment of the provisions without substantial change, and the regulation has been applied for so long that it is too late now to overturn it, but it may be treated as adopted by Congress. See *National Lead Company* v. *United States*, 252 U. S. 140, 146; *United States* v. *G. Falk & Brother*, 204 U. S. 143, 152. If Congress confirmed the regulation, it adopted it as a whole, including the requirement of a separate billing of the tax.

The tax imposed by Section 628 of the Revenue Act of 1918 disappeared upon the enactment of the Revenue Act of 1921 (Act of November 23, 1921, c. 136, 42 Stat. 227), there being substituted therefor by Section 602 of the 1921 Act a tax of a fixed amount per gallon. But other taxes imposed by the 1918 Act upon the vendor and measured by the price for which certain articles are sold have been continued in later Acts, and the Commissioner has consistently ruled with respect to all of these that the tax can be regarded as passed on to the purchaser and deducted from the amount received to determine the selling price if quoted and billed separately, but not otherwise.

Thus the excise tax imposed by Section 900 of the Revenue Act of 1918 upon the selling price of various commodities was continued with decreasing

schedules of commodities as Section 900 of the Revenue Act of 1921 and as Section 600 of the Revenue Act of 1924 (Act of June 2, 1924, c. 234, 43 Stat. 253, 322) and of the Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9, 93). Article 3 of Regulations 47, as issued on May 1, 1919, and as revised in December, 1920, deal with the tax imposed by Section 900 of the Revenue Act of 1918 and are set forth in Appendix D. Revisions of Article 3 of Regulations 47 on January 6, 1922 (T. D. 3278), August 29, 1924 (T. D. 3630), and May 1, 1926 (T. D. 3862) deal with the tax under the later Acts and are not substantially different from the revision of December, 1920.

The tax on works of art, sold by any person other than the artist, imposed by Section 902 of the Revenue Act of 1918, and the tax upon certain sales of jewelry by dealers, imposed by Section 905, both taxes being based upon "the price for which so sold," were continued by Sections 902 and 905 of the Revenue Act of 1921, and Sections 602 and 604 of the Revenue Act of 1924. Article 1 of Regulations 48 issued May 2, 1919, deals with these taxes and is set forth in Appendix E. Revisions of January 12, 1922 (T. D. 3279), and September 16, 1924 (T. D. 3632), make no substantial change.

It appears, therefore, that although the Commissioner has always construed the words "the price for which so sold" as being the total amount received if the tax is not quoted and billed separately and as being that amount less the tax if the tax

is quoted and billed separately, nevertheless Congress has continued to use the words without change or definition. It may be said, therefore, that Congress has approved and ratified the Commissioner's construction. That the regulations should be upheld if possible is of course desirable. They have been in effect for almost ten years and a vast number of returns have been made and taxes paid in reliance upon them. To collect the additional taxes which would be due if the regulations were declared invalid would be impossible in most cases as well as unfair to manufacturers, who in fixing their prices must have taken into account the amount of tax supposed to be due.

III

WHETHER OR NOT ARTICLE 8 OF REGULATIONS 52 IS VALID THE PETITIONER CAN NOT SUCCEED

If the provision of the regulation providing that the tax, as such, if separately billed may be passed on to the purchaser and the amount received by the seller divided into two items, selling price and tax, is invalid, the tax must always remain where it is originally imposed, that is, on the seller. Under such circumstances there could, of course, be no basis for the petitioner's contention that part of the amounts received by it was received as tax and was not part of the price for which its products were sold.

But the petitioner's contention is that the portion of the regulation permitting the tax, as such,

to be passed on to the purchaser is valid, but that the portion of the regulation requiring separate billing to accomplish this passing on is invalid; that the notice given by the petitioner to its customers that its prices included the sales tax, which would be paid by the petitioner, was sufficient to pass on the tax, as such, to the customers. This contention seems to us to be utterly illogical. As pointed out above, we believe that if the regulation is valid it must be because of Congressional ratification. Such ratification applies equally to both portions of the regulation, and if the provision permitting the tax to be passed on is valid, so must be the requirement of separate billing to accomplish this. We consider it entirely immaterial whether there was any sound reason for the requirement of separate billing. It has been suggested that such billing facilitated auditing of tax returns, but whether or not this was so the requirement was inserted in the regulation and if the regulation was ratified by Congress it was with the requirement included. The petitioner did not comply with the requirement and has no right to complain.

IV

THE CASES IN THE LOWER COURTS

Several cases in the lower Federal courts have involved claims similar to that of the petitioner in the present case. In *Clicquot Club Co.* v. *United States*, 13 F. (2d) 655, the District Court for Mas-

sachusetts decided in favor of the taxpayer, and no appeal was taken. In *Elmer Candy Co., Inc.* v. *Fauntleroy, Collector*, 19 F. (2d) 664, the District Court for the Eastern District of Louisiana decided in favor of the Collector. The judgment of the District Court was reversed by the Circuit Court of Appeals for the Fifth Circuit, 24 F. (2d) 95. Certiorari was granted by this Court May 28, 1928, and the case is now pending as *Fauntleroy* v. *Elmer Candy Company, Inc.*, No. 119, October Term, 1928. In *White Rock Mineral Springs Co.* v. *Edwards*, 23 F. (2d) 539, the District Court for the Southern District of New York decided in favor of the Collector.

CONCLUSION

The judgment of the Court of Claims was right and should be affirmed.

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GARDNER P. LLOYD,
Special Assistant to the Attorney General.

DECEMBER, 1928.

APPENDIX A

PROVISIONS OF THE REVENUE ACT OF 1918, OTHER THAN SECTION 628, IMPOSING A SALES TAX ON THE VENDOR MEASURED BY SELLING PRICE

SEC. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum: * * *.

There follows a schedule of twenty other classes of commodities upon which taxes at various percentages are imposed.

SEC. 902. That there shall be levied, assessed, collected, and paid upon sculpture, paintings, statuary, art porcelains, and bronzes, sold by any person other than the artist, a tax equivalent to 10 per centum of the price for which so sold. This section shall not apply to the sale of any such article to an educational institution or public art museum.

SEC. 903. That every person liable for any tax imposed by section 900, 902, or 906, shall make monthly returns under oath in duplicate and pay the taxes imposed by such sections to the collector for the district in which

is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

SEC. 905. That on and after April 1, 1919, there shall be levied, assessed, collected, and paid (in lieu of the tax imposed by subdivision (e) of section 600 of the Revenue Act of 1917) upon all articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornamented, mounted or fitted with, precious metals or imitations thereof or ivory (not including surgical instruments); watches; clocks; opera glasses; lorgnettes; marine glasses; field glasses; and binoculars; upon any of the above when sold by or for a dealer or his estate for consumption or use, a tax equivalent to 5 per centum of the price for which so sold.

Every person selling any of the articles enumerated in this section shall make returns under oath in duplicate (monthly or quarterly as the Commissioner, with the approval of the Secretary, may prescribe) and pay the taxes imposed in respect to such articles by this section to the collector for the district in which is located the principal place of

business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

Appendix B

PROVISIONS OF THE REVENUE ACT OF 1918, IMPOSING A TAX UPON THE PURCHASER MEASURED BY THE "AMOUNT PAID"

1. *The tax on transportation and other facilities.*

SEC. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1917—

(a) A tax equivalent to 3 per centum of the amount paid for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water, of property by freight transported from one point in the United States to another; and a like tax on the amount paid for such transportation within the United States of property transported from a point without the United States to a point within the United States;

Then follow similar provisions taxing at various rates other transportation and similar facilities.

SEC. 501 (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * *

Paragraphs (c) and (d) provide that if the carrier, because of ownership of the goods transported, or for any other reason, does not receive the amount

it would otherwise charge, it must itself pay the tax.

SEC. 502. That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under subdivision (c) or (d) of section 501 to the collector of the district in which the principal office or place of business is located.

No carrier collecting the taxes imposed by subdivision (a) or (b) of section 500 shall be required to list the amount of such tax separately in any bill of lading, freight or express receipt, or other similar document, if the total amount of the transportation charge and the tax is stated therein.

Any person making a refund of any payment upon which tax is collected under this section may repay therewith the amount of the tax collected on such payment; and the amount so repaid may be credited against amounts included in any subsequent monthly return.

The returns required under this section shall contain such information, and be made at such times and in such manner, as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

2. *Taxes on admissions and dues.*

SEC. 800. (a) That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 700 of the Revenue Act of 1917—

(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission;

(2) In the case of persons (except bona fide employees, municipal officers on official business, persons in the military or naval forces of the United States when in uniform, and children under twelve years of age) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, a tax of 1 cent for each 10 cents or fraction thereof of the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted;

(3) Upon tickets or cards of admission to theaters, operas, and other places of amusement, sold at news stands, hotels, and places other than the ticket offices of such theaters, operas, or other places of amusement, at not to exceed 50 cents in excess of the sum of the established price therefor at such ticket offices plus the amount of any tax imposed under paragraph (1), a tax equivalent to 5 per centum of the amount of such excess; and if sold for more than 50 cents in excess of the sum of such established price plus the amount of any tax imposed under paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess, such taxes to be returned and paid, in the manner pro-

vided in section 903, by the person selling such tickets;

(4) A tax equivalent to 50 per centum of the amount for which the proprietors, managers, or employees of any opera house, theater, or other place of amusement sell or dispose of tickets or cards of admission in excess of the regular or established price or charge therefor, such tax to be returned and paid, in the manner provided in section 903, by the person selling such tickets;

(5) In the case of persons having the permanent use of boxes or seats in an opera house or any place of amusement or a lease for the use of such box or seat in such opera house or place of amusement (in lieu of the tax imposed by paragraph (1)), a tax equivalent to 10 per centum of the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by or for the lessee or holder, such tax to be paid by the lessee or holder; and

(6) A tax of 1½ cents for each 10 cents or fraction thereof of the amount paid for admission to any public performance for profit at any roof garden, cabaret, or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service, or merchandise; the amount paid for such admission to be deemed to be 20 per centum of the amount paid for refreshment, service, and merchandise; such tax to be paid by the person paying for such refreshment, service, or merchandise.

* * * * *

SEC. 801. That from and after April 1, 1919 there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by sec-

tion 701 of the Revenue Act of 1917, a tax equivalent to 10 per centum of any amount paid on or after such date, for any period after such date, (a) as dues or membership fees (where the dues or fees of an active resident annual member are in excess of $10 per year) to any social, athletic, or sporting club or organization; or (b) as initiation fee to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees (not including initiation fees) of an active resident annual member are in excess of $10 per year; such taxes to be paid by the person paying such dues or fees: * * *.

SEC. 802. That every person (a) receiving any payments for such admission, dues, or fees shall collect the amount of the tax imposed by section 800 or 801 from the person making such payments, or (b) admitting any person free to any place for admission to which a charge is made, shall collect the amount of the tax imposed by section 800 from the person so admitted. Every club or organization having life members, shall collect from such members the amount of the tax imposed by section 801. In all the above cases returns and payments of the amount so collected shall be made at the same time and in the same manner as provided in section 502.

3. *Taxes on sales by dealers of articles at prices in excess of amounts specified.*

SEC. 904 (a). That on and after May 1, 1919, there shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of so much of the amount paid for any of the following articles as is in excess

of the price hereinafter specified as to each such article, when such article is sold by or for a dealer or his estate on or after such date for consumption or use—

(1) Carpets and rugs, including fiber, except imported and American rugs made principally of wool, on the amount in excess of $5 per square yard;

* * * * *

Then follow provisions similar to those of paragraph (1) with respect to nineteen other classes of articles.

(c) The taxes imposed by this section shall be paid by the purchaser to the vendor at the time of the sale and shall be collected, returned, and paid to the United States by such vendor in the same manner as provided in section 502.

4. *Taxes on toilet articles, proprietary medicines, etc.*

SEC. 907 (a). That on and after May 1, 1919, there shall be levied, assessed, collected, and paid (in lieu of the taxes imposed by subdivision (g) and (h) of section 600 of the Revenue Act of 1917) a tax of 1 cent for each 25 cents or fraction thereof of the amount paid for any of the following articles when sold by or for a dealer or his estate on or after such date for consumption or use;

Then follows a schedule of various toilet articles, proprietary medicines, etc.

(b) The taxes imposed by this section shall be collected by whichever of the following methods the Commissioner may deem expedient: (1) by stamp affixed to such article by the vendor, the cost of which shall be re-

imbursed to the vendor by the purchaser; or (2) by payment to the vendor by the purchaser at the time of the sale, the taxes so collected being returned and paid to the United States by such vendor in the same manner as provided in section 502.

Appendix C

Section 1312 of the Revenue Act of 1918—

Sec. 1312. (1) That (a) if any person has prior to May 9, 1917, made a bona fide contract with a dealer for the sale or lease, after the tax takes effect, of any article in respect to which a tax is imposed under Title VI, VII, or IX, or under subdivision 13 of Schedule A of Title XI, or under this subdivision, and (b) if such contract does not permit the adding of the whole of such tax to the amount to be paid under such contract, then the vendee or lessee shall, in lieu of the vendor or lessor, pay so much of such tax as is not so permitted to be added to the contract price. If a contract of the character above described was made with any person other than a dealer, the tax collected under this Act shall be the tax in force on May 9, 1917.

(2) If (a) any person has prior to September 3, 1918, made a bona fide contract with a dealer for the sale or lease, after the tax takes effect, of any article in respect to which a tax is imposed under Titles VI, VII, or IX, or under subdivision 13 of Schedule A of Title XI, or under this subdivision, and in respect to which no corresponding tax was imposed by the Revenue Act of 1917, and (b) such contract does not permit the adding, to the amount to be paid under such contract, of the whole of the tax imposed by this Act, then the vendee or lessee shall, in lieu of the vendor or lessor, pay so much of the tax imposed by this Act as is not so permitted to be added to the contract price. If

a contract of the character above described was made with any person other than a dealer, no tax shall be collected under this Act.

(3) If (a) any person has prior to September 3, 1918, made a bona fide contract with a dealer for the sale or lease, after the tax takes effect, of any article in respect to which a tax is imposed under Title VI, VII, or IX, or under subdivision 13 of Schedule A of Title XI, or under this subdivision, and in respect to which a corresponding tax was imposed by the Revenue Act of 1917, and (b) such contract does not permit the adding, to the amount to be paid under such contract, of the whole of the difference between such tax and the corresponding tax imposed by the Revenue Act of 1917, then the vendee or lessee shall, in lieu of the vendor or lessor, pay so much of such difference as is not so permitted to be added to the contract price. If a contract of the character above described was made with any person other than a dealer, the tax collected under this Act shall be the tax in force on September 3, 1918.

(4) The taxes payable by the vendee or lessee under this section shall be paid to the vendor or lessor at the time the sale or lease is consummated, and collected, returned, and paid to the United States by such vendor or lessor in the same manner as provided in section 502.

(5) The term "dealer" as used in this section includes a vendee who purchases any article with intent to use it in the manufacture or production of another article intended for sale.

(6) This section shall not apply to any tax imposed by section 906.

Appendix D

TREASURY REGULATIONS DEALING WITH THE EXCISE TAX IMPOSED BY SECTION 900 OF THE REVENUE ACT OF 1918 UPON THE SELLING PRICE OF VARIOUS COMMODITIES

Article 3 of Regulations 47, issued May 1, 1919, was as follows:

> The tax is on the sale by the manufacturer of the taxable article. It is measured by the price for which the article is sold. It is on the actual sales price of the goods sold, and not on the list price, where that differs from the sales price. If the price of a taxable article is increased to cover the tax, the tax is on such increased price. Where, however, the tax is billed as a separate item such amount need not be included in the price of the article in computing the tax. The tax is payable in respect to a sale made, whether or not the purchase price is actually collected.

By the revision of December, 1920, Article 3, Regulations 47, was amended to read as follows:

> The tax is imposed on the sale by the manufacturer and should be returned and paid by him whether the sales price is actually collected or not. It is measured by the price for which the article is sold by the manufacturer and not by the list price where that differs from the actual sales price. If the price of a taxable article is increased to cover the tax, and the article is sold at such price, including the tax, the tax is on such increased price.
>
> The manufacturer may reimburse himself in the amount of the tax by agreement with

the purchaser in the following manner: (a) By quoting the selling price and the tax in separate and exact amounts, and where invoices are rendered, by segregating these amounts on the invoices as outlined in examples (1) and (6) below; or (b) by stating to the purchaser in advance of the sale what portion of the quoted price represents the price charged for the article and what portion represents tax, and where invoices are rendered by invoicing in the manner outlined in examples (2) and (3) below, in which cases the amount of the tax need not be included in the price of the article in computing the tax.

Where goods are ordered direct from the manufacturer with no agreement as to price, the tax is based on the amount billed or invoiced to the purchaser as the selling price. Mere statements or agreements that the quoted or contract price includes the tax do not operate to exclude any part thereof from tax, unless the price is billed in the manner outlined in example (1), (2), (3), or (6) below.

Where a lump sum is specified as the price of a taxable article or articles, and other articles not taxable and not a component part of the taxable articles are included in the price, the tax attaches to the entire amount unless the selling price of the taxable and nontaxable articles are segregated. In such case the tax will be measured by the price specified as the selling price of the taxable article or articles (examples 4 and 5). The following examples illustrate a method by which the manufacturer may separate the tax from the selling price in invoicing goods to the purchaser.

Example (1). A, the manufacturer, quotes a selling price to B of $1 and bills the goods to B as:

"Article No. 1, selling price, $1; tax, $0.05."

Example (2). A, the manufacturer, quotes a selling price of $1.05, stating that the price includes a tax of 5 cents, and bills the goods to B as:

"Article No. 1, selling price $1.05, 5 cents of the total represents tax."

Example (3). A, the manufacturer, quotes a selling price of $1.05, stating that 1/21 of the price represents tax, and bills the goods to B as:

"Article No. 1, selling price $1.05, 1/21 of the total represents tax."

The tax in examples (1), (2), and (3) is computed upon $1, the quoted and actual selling price.

Example (4). A, the manufacturer, quotes a cost price or contracts to sell goods at $1.05, including tax, and bills the goods to B as:

"Article No. 1, selling price, including tax, $1.05."

The tax is computed upon $1.05, the quoted and invoiced selling price.

Example (5). A manufacturer sells an automobile to B, including insurance, gas, and oil, and bills it as:

"One car, $2,150."

The tax is based on the full amount of $2,150.

Example (6). If in example (5) the invoice separates the charges into items as "car $2,000; gas and oil $20, insurance $30, tax $100," the tax is based on $2,000, the selling price of the car as specified.

APPENDIX E

TREASURY REGULATIONS DEALING WITH THE TAX ON WORKS OF ART, SOLD BY ANY PERSON OTHER THAN THE ARTIST, IMPOSED BY SECTION 902 OF THE REVENUE ACT OF 1918, AND THE TAX UPON CERTAIN SALES OF JEWELRY BY DEALERS, IMPOSED BY SECTION 905

Article 1 of Regulations 48 issued May 2, 1919, was as follows:

> ARTICLE 1. *Basis of tax.*—The tax is measured by the price for which the article is sold. It is on the actual sales price of the goods, and not on the list price, where that differs from the sales price. If the price of a taxable article is increased to cover the tax, the tax is on such increased price. Where, however, the tax is billed as a separate item, such amount need not be included in the price of the article in computing the tax. The tax is payable in respect to a sale made whether or not the purchase price is actually collected. A discount for cash or other discount made subsequently to the sale can not be deducted in computing the price for the purpose of the tax. Where, however, articles are sold over a period of time under an agreement for a quantity rebate, the tax, if originally computed on the gross price, may be adjusted in the return for the month in which the price is finally determined. Commissions to agents and other expenses of sale are not deductible from the price. If articles are sold and the delivery charges to point of delivery are paid by the purchaser

as a specific item, or if they are sold delivered at a sum less delivery charges to be paid by the purchaser, such charges need not be included as a part of the price of the goods; but if the vendor sells goods at a delivered price and pays the delivery charges, he is not entitled to make any deduction on account of the inclusion in the price of such charges.

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